



Commander Navy Region Southeast

# CITY OF JACKSONVILLE, FLORIDA LAWSUIT AGAINST THE NAVY

David Pipkin & LCDR Sue Stewart

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## REC & RC★ ACTIVITIES

### TENNESSEE

NSA MID-SOUTH  
NSWC DET MEMPHIS

### MISSISSIPPI

NAS MERIDIAN  
NCBC GULFPORT  
NS PASCAGOULA  
SUPSHIP PASCAGOULA  
NAVAL METEOROLOGY AND  
OCEANOGRAPHY COMMAND  
STENNIS SPACE CENTER

### FLORIDA

NAS WHITING FIELD  
NAS PENSACOLA  
PWC PENSACOLA  
NETPMSA PENSACOLA  
NAVTECHTRACEN  
PENSACOLA  
NSWC CSS PANAMA  
CITY

NS MAYPORT  
NAS JACKSONVILLE  
PWC JACKSONVILLE  
NADEP JACKSONVILLE  
FISC JACKSONVILLE  
NAF KEY WEST  
NOTU CAPE CANAVERAL  
NSWC FT LAUDERDALE DET

COMNAVBASE GUANTANAMO BAY

### NORTH CAROLINA

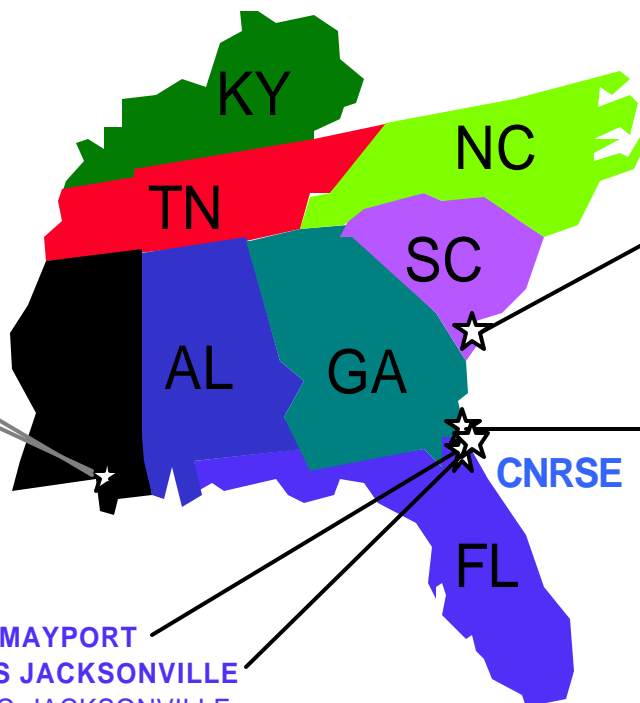
NADEP CHERRY POINT  
HPDTA HERTFORD

### SOUTH CAROLINA

WPNSTA CHARLESTON  
SOUTHNAVFACENGCOM

### GEORGIA

NAS ATLANTA  
NSB KINGS BAY  
TRIREFFAC  
SWFLANT  
NAVSCSOL ATHENS



CNRSE



NAVSTA ROOSEVELT ROADS



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# CITY OF JACKSONVILLE, FLORIDA LAWSUIT AGAINST THE NAVY

## OBJECTIVE

- Overview of counts in lawsuit
- Legal history, current status and future implications



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# Initial Complaint for Civil Penalties 8 Mar 01

## Count I: Sulfur Violations

- PWC Boiler Fuel Oil Sulfur Content > 0.05%

## Count II: Air Emission Violations

- Aerospace NESHAP
  - NAS Non-compliant hand-wipe solvent use
  - NADEP Non-compliant coating use



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# Amended Complaint for Civil Penalties 7 Mar 02

- Added four counts and re-racked
  - Count I: Building 952's Boiler Permit (PWC)
  - Count II: Building 969's Boiler Permit (NADEP)
  - Count III: Aerospace NESHAP  
(NADEP, NAS Squadrons, AIMD)
  - Count IV: Chrome NESHAP (NADEP)
  - Counts V & VI: NAVSTA Mayport Boilers  
#1 & #2 (PWC)



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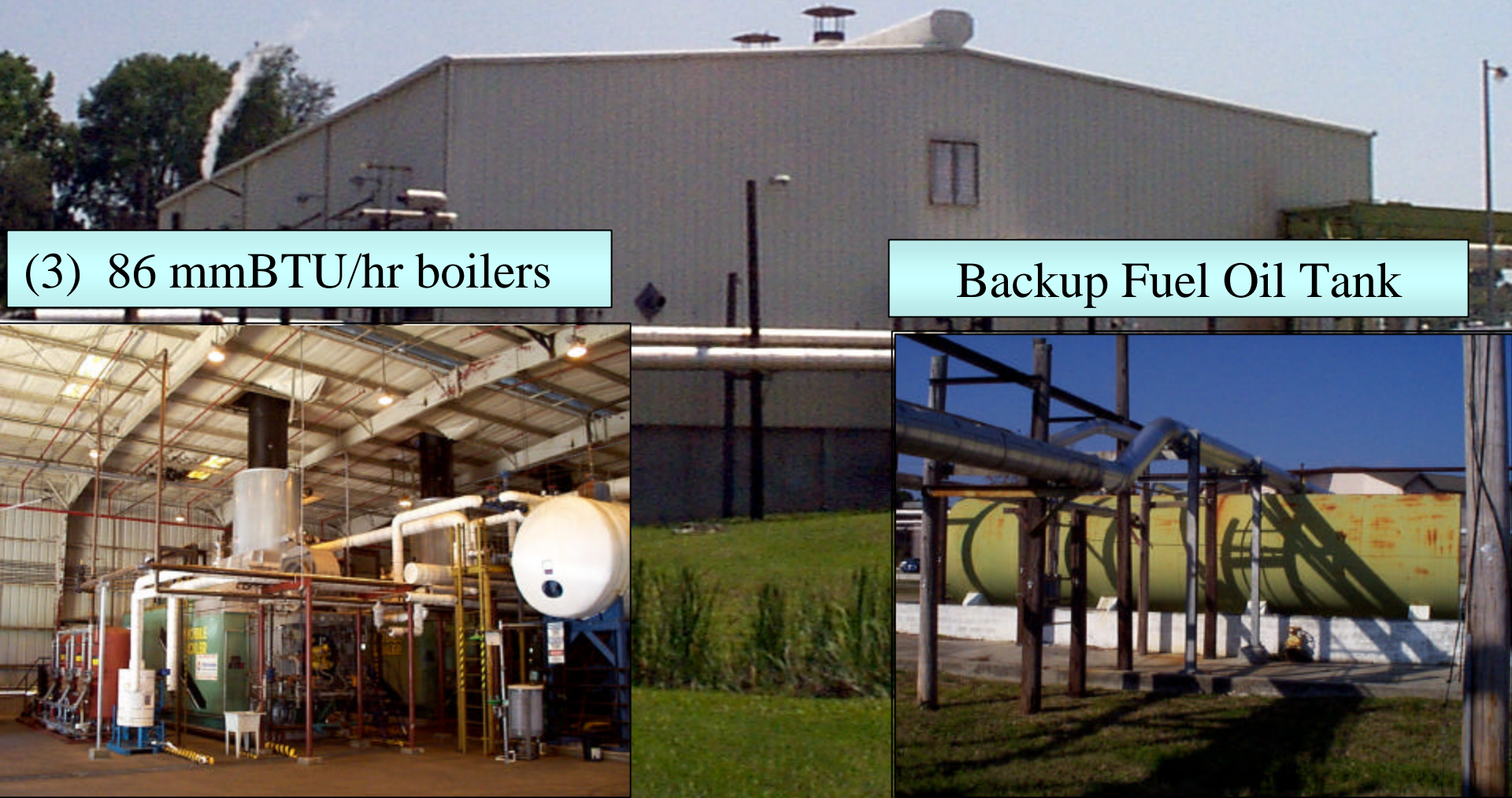
### Count I: BLDG 952 BOILER

- PWC Notified City of Jacksonville RESD by phone on 5 Feb 97 of sulfur exceedence
  - Contractor delivered “high sulfur” fuel oil (backup)
  - PWC locked-out tanks when discovered
  - Boilers burned fuel oil on 3 days before discovery
- RESD issued Notice to Correct 11 Aug 97
- Cease and Desist Order 22 Dec 97
- Draft Consent Order 19 Aug 98



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## BLDG 952 Steam Plant



(3) 86 mmBTU/hr boilers



Backup Fuel Oil Tank





### Count II: NADEP BLDG 969 Boiler Permit Sulfur Violations

- Boiler Horsepower Rating misidentified as exempt in initial inventory ( $< 1$  mmBTU/hr)
- Error discovered several months after Title V conditions in force (1.67 mmBTU/hr)
- Operated ~ 27 days out of compliance



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## Count II (Cont.): NADEP BLDG 969 Boiler



## NADEP BLDG 873 Engine Test Cells



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### Count III: Aerospace NESHAP Air Emission Violations (NADEP, NAS Squadrons, AIMD)

#### ➔ Compliance Reports (Sep 98 - Aug 99)



- ☹ Hand-wipe Cleaning Solvent exceeded vapor pressure limits ( $> 45$  mm Hg) ~ 5 oz MEK & ~ 12 gal naphtha w/  $vp \geq 60$  mmHg
- ☹ Supply issues 150 gal non-compliant coating (out of stock primer substitution w/  $> 2.9$  lb/gal VOC content) ~ 0.14 TPY VOC
- ☹ Failure to record pressure drop across filter banks on 3 paint booths (for each shift)



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## Form B - Non-Compliant Solvent Use Log

Squadron/Organization \_\_\_\_\_ Month/Year \_\_\_\_\_

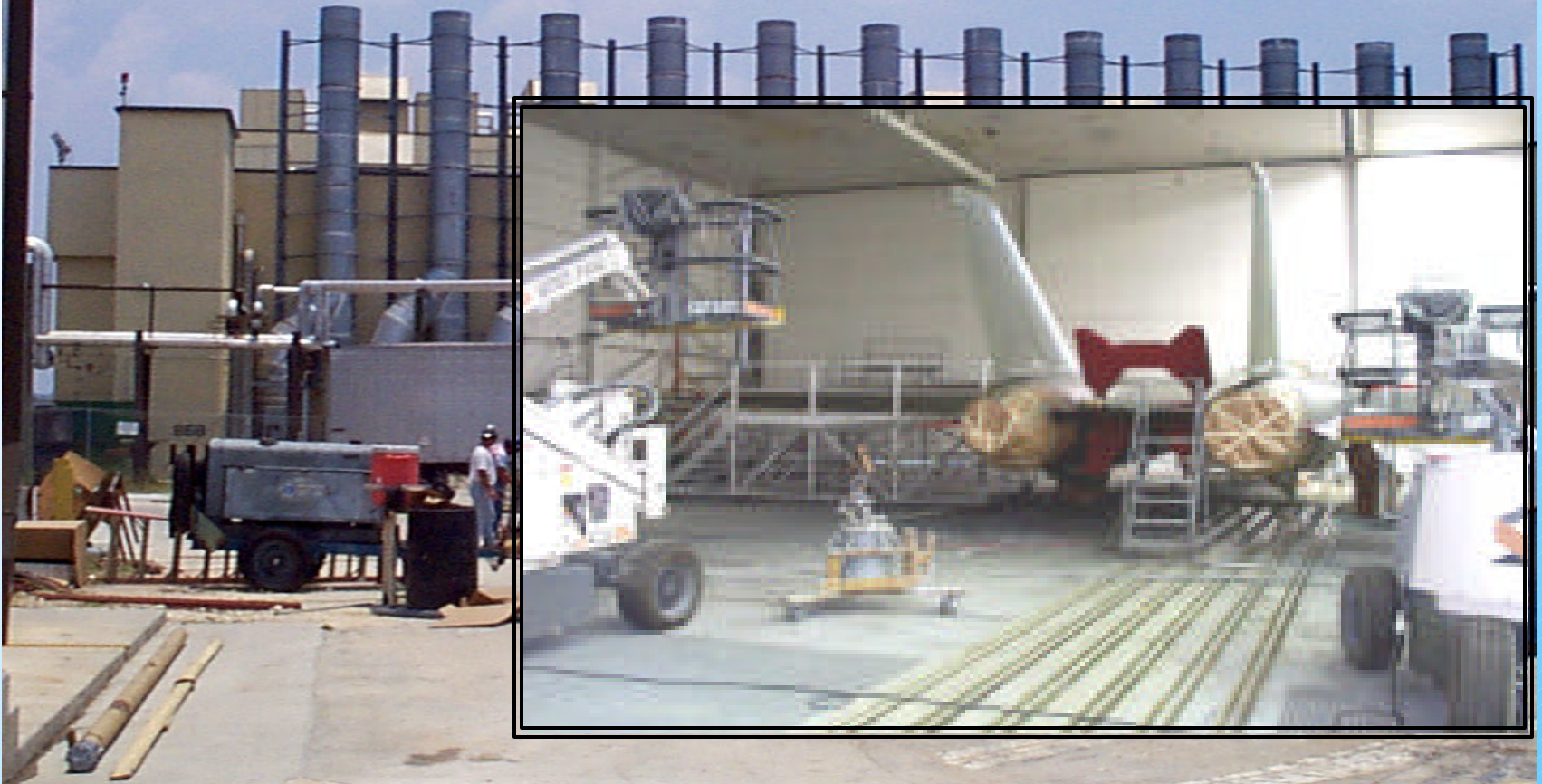
(1) Date	(2) Solvent Used	(3) NSN	(4) Manufacturer	(5) Purpose
				
				



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## NADEP Aircraft Painting Hangar 868

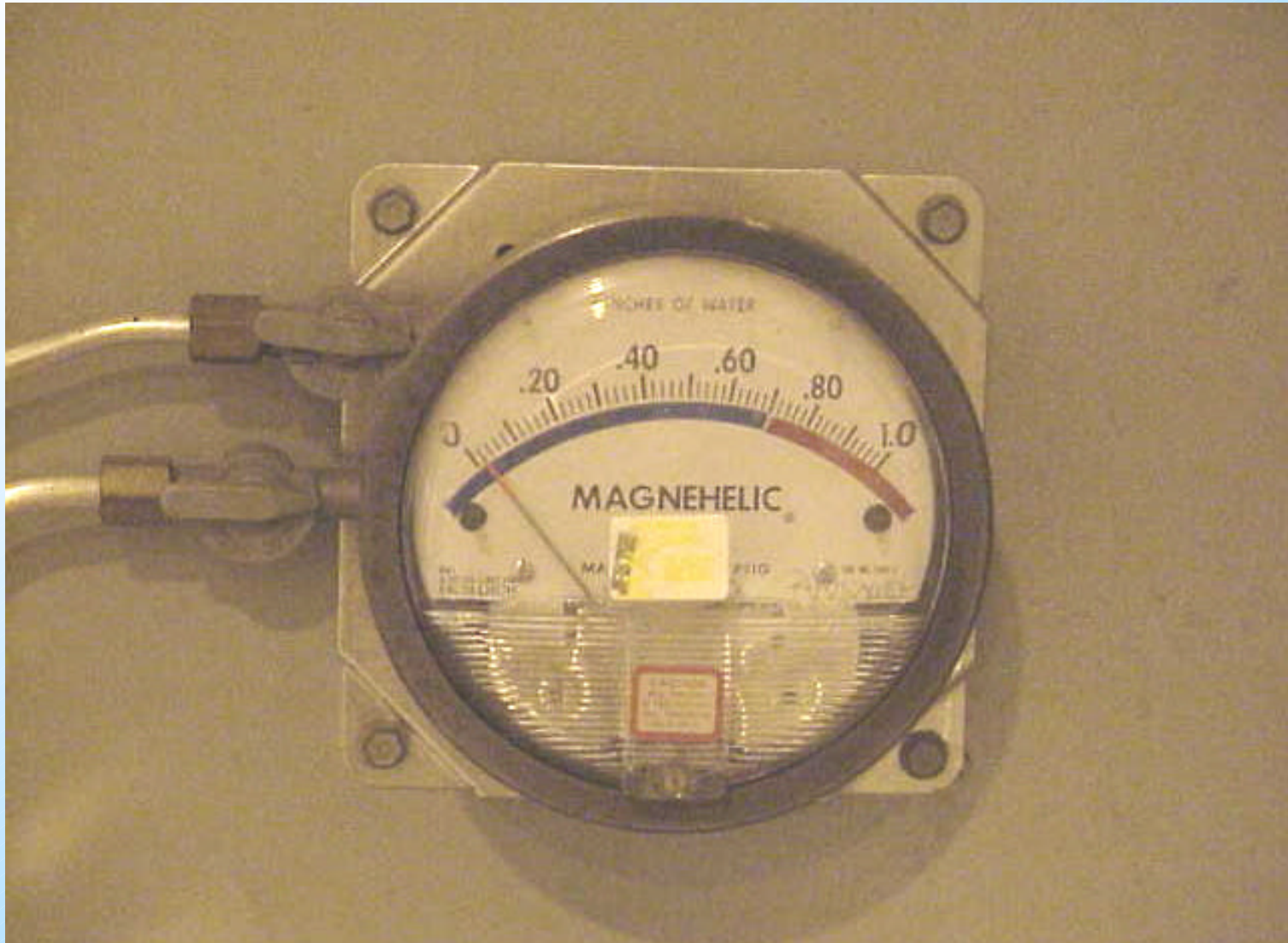
Estimated PTE ~20 TPY VOCs





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Read & Record Pressure Drop Once per Shift





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### Count IV: NADEP Chrome Plating Operation Violation

- Semi-annual Chrome NESHAP Report indicated pressure drop ranges
- Pressure drop across scrubber mesh pads must be recorded once per day when plating
  - Jan 97 compliance performance test established pressure drop range at 1-3 inches, water gauge
  - Self audit revealed 156 days where records indicate range exceeded since Jan 97



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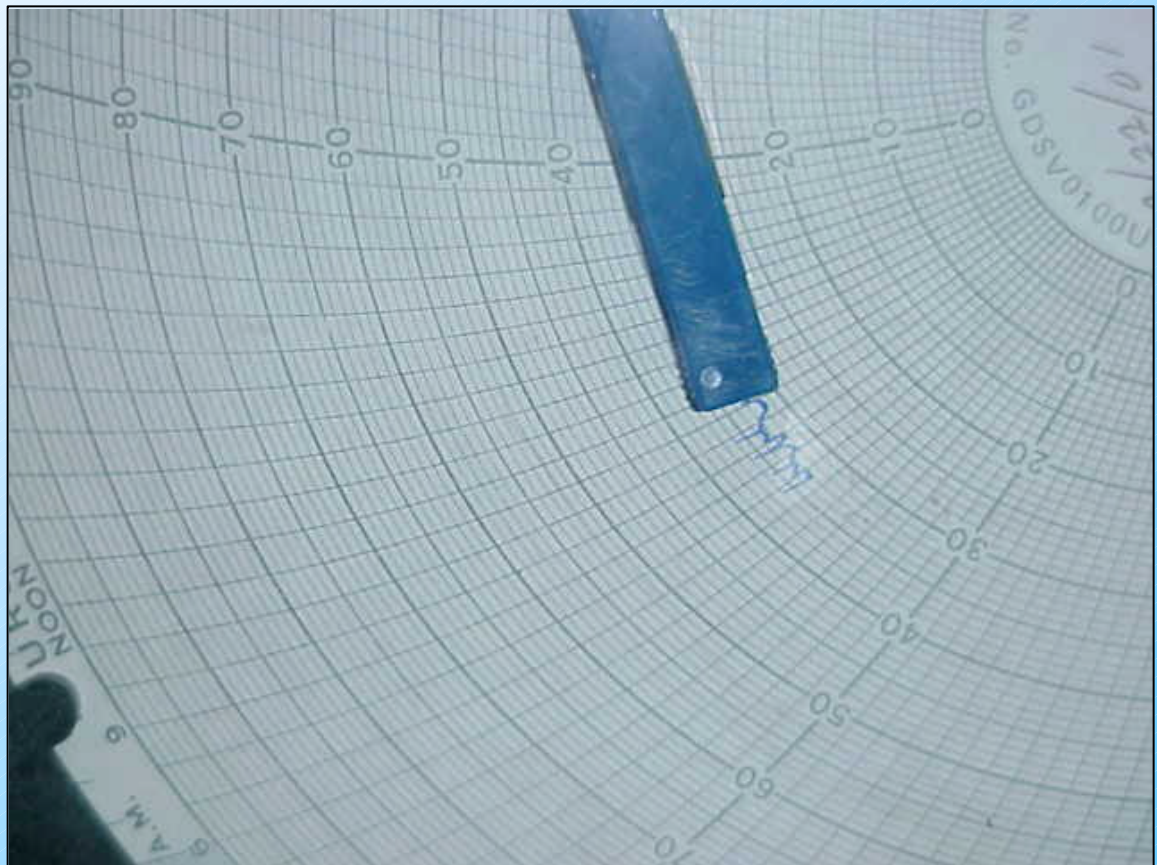
## BLDG 794 Chrome Scrubber Unit





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## Chrome Scrubber Pressure Drop Chart Recorder





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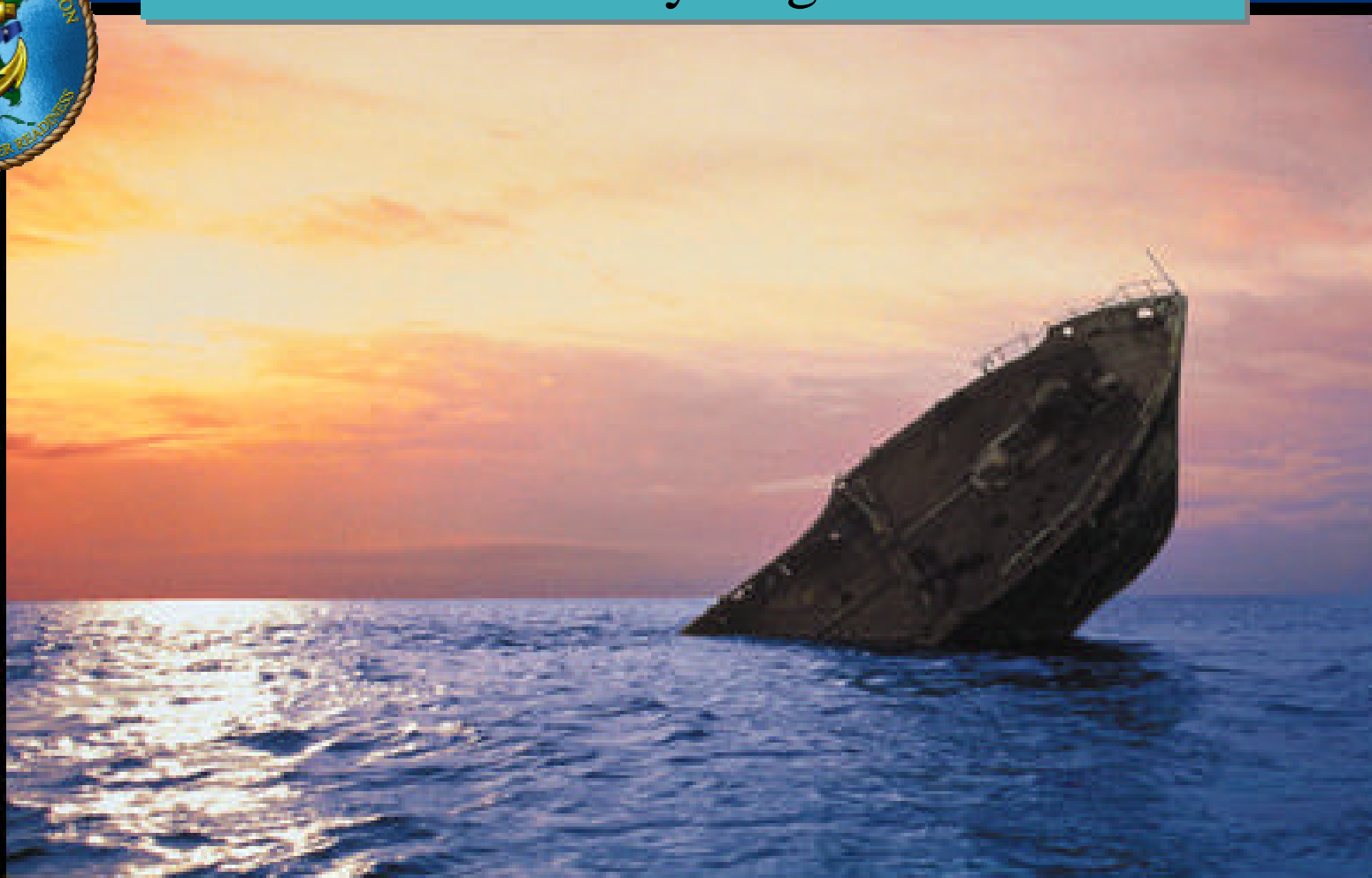
# Counts V & VI: NAVSTA Mayport Permit Violations: Boilers 1&2 (PWC)

NAVSTA Mayport BLDG 1241

- Late Visible Emissions Reports for two steam boilers
  - City of Jacksonville permit requires annual VE test after reaching 400 hours of operation
  - Permit references FL Rule which indicates VE testing after 400 hrs operation each year



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# MISTAKES

IT COULD BE THAT THE PURPOSE OF YOUR LIFE IS  
ONLY TO SERVE AS A WARNING TO OTHERS.



# LEGAL HISTORY

- On 19 Aug 98, City of Jacksonville forwarded proposed consent order to resolve violations in a Cease & Desist Order of 22 Dec 97.
- Navy refused to pay penalties on 29 Oct 98.
- On 28 Nov 98, City referred case to EPA for action. EPA declined to pursue action.
  - EPA has authority to assess civil penalties under CAA. 1997 WL 1188105 (OLC), July 16, 1997.



# LEGAL HISTORY

- On 9 Mar 01, City files suit in state court.
- On 3 Apr 01, Navy removed the action to Federal Court pursuant to 28 U.S.C. 1442(a)(1).
- On 2 May 01, City requested remand of case to State Court.
  - Relied on decision by 9th Cir. Ct. of Appeals (Army case involving CAA penalties). Sacramento Metro. Air Quality Management District v. U.S., 215 F.3d 1005 (9th Cir. 2000).



# LEGAL HISTORY

- Argument on remand issue held 21 Jun 01.
- While the motion for remand was pending, Navy filed on 30 Jul 01 a motion for Judgement on the pleadings.
  - Navy argued that SI was not waived for payment of penalties under CAA.
  - City responded on 7 Sep 01.
  - Hearing held on motion on 27 Nov 01.



# DISTRICT COURT RULING

- On 4 Feb 02, U.S. Dist. Ct. for Middle District of FL (Jacksonville Division) ruled as follows:
  - Ruled in favor of Navy on removal/remand issue;
  - Ruled against Navy on SI defense.



# The Court's Rationale

- JAX CT DISAGREES WITH SACRAMENTO REMOVAL DECISION
  - No other case law to support decision; removal statute passed after CAA Amendments
- SOVEREIGN IMMUNITY
  - United States v. Tennessee Air Pollution Control Board, 185 F.3d 529 (6th Cir. 1999).
  - D.Ct. finds waiver under both Citizen Suit & Fed. Fac. Provisions; 6th Cir. only addresses Citizen Suit provision.



# SOVEREIGN IMMUNITY

- BASIC TENETS
  - Can only be sued if SI is waived
  - SI must be unequivocally expressed in statutory text; must be unambiguous and clear waiver
  - Can't use legislative history to clarify ambiguity.



# IS THERE A WAIVER?

- **FEDERAL FACILITIES PROVISION**
  - CAA s.118 (42 USC 7418)
- **CITIZEN SUIT PROVISION**
  - CAA s.304 (42 USC 7604)
- **5 MAIN CASES (CAA v. CWA)**
  - DOE v. Ohio, 503 US 607 (1992)
  - TN case, 185 F.3d 529 (1999)
  - GA case, 897 F.Supp. 1464 (N.D. Ga. 1995)
  - JAX & Sacramento ongoing litigation



# Federal Facilities Provision under CWA v. CAA

- JAX argued no waiver of SI based on DOE case.
  - Sacramento case supports this argument. Case vacated on other grounds.
- DOE case: no waiver in FF proviso. Why?
  - Focus on words “process and sanctions.”
  - Held to waive SI for coercive fines only.
    - Sanctions = broad term.
    - Look at context of the term “sanctions.”
      - Text speaks of sanctions in context of enforcing “process” (forward looking mechanism) v. “requirements” (past).



# Federal Facilities Provision under CWA v. CAA

- Language of “process” and “sanction” is identical in both CWA and CAA.
  - GA Dist. Ct. reaffirms DOE holding.
- TN court noted this fact but held can’t read federal facilities provision in isolation.
  - Focus on its relationship with citizen suit provision.
- JAX Court satisfied with TN interpretation.



# CITIZEN SUIT PROVISION

- Focus must be on section 7418. *See* Georgia Dep't of Natural Resources, 897 F.Supp. 1464, 1470 (N.D. Ga. 1995)(post-dates DOE case). TN case disagrees.
- DOE case held no waiver of SI under the citizen suit provision (CWA).
- FOCUS on differences in savings clause provision of 42 USC 7604(e).



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## SECTION 7604(e)

- Language differs in CWA v. CAA.
- “Nothing in this section or in **any other law** of the United States shall be construed to prohibit ... any State ... from ...
  - bringing any administrative enforcement action or obtaining any administrative remedy or sanction ... against the United States... .”



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# “Any other law”

- Does it waive Sovereign Immunity?
  - TN case and JAX ruling says yes.
  - TN case: The words “any administrative remedy or sanction” as used in 7604(e) clearly encompass civil penalties for past violations. Enforcement authority isn’t limited to prospective, coercive action nor is it restricted by “any other law” including sovereign immunity.



# ADDRESSING TN CASE

- TN court held that federal facilities provision defined US' burden to comply with law and citizen suit provision removes any impediment to enforcement. (Section 7604(e) refers to section 7418 for compliance by federal facilities.)
- Navy position: natural reading of savings clause, citizen suit provision doesn't preempt an ability to enforce that is otherwise allowed by Congress in federal facilities provision.
  - Can't use savings clause to limit the waiver in federal facilities provision.



# ADDRESSING THE TN CASE

- AMBIGUOUS LANGUAGE
- NEGATIVE v. AFFIRMATIVE LANGUAGE
  - FF provision is affirmative v. CS language
  - Waiver of SI must clearly indicate an affirmative waiver by Congress.
- CWA & CAA don't authorize payment of civil penalties to private citizens or to states.
  - Citizen suit money deposited in US Treasury.



# WHAT DOES THE FUTURE HOLD?

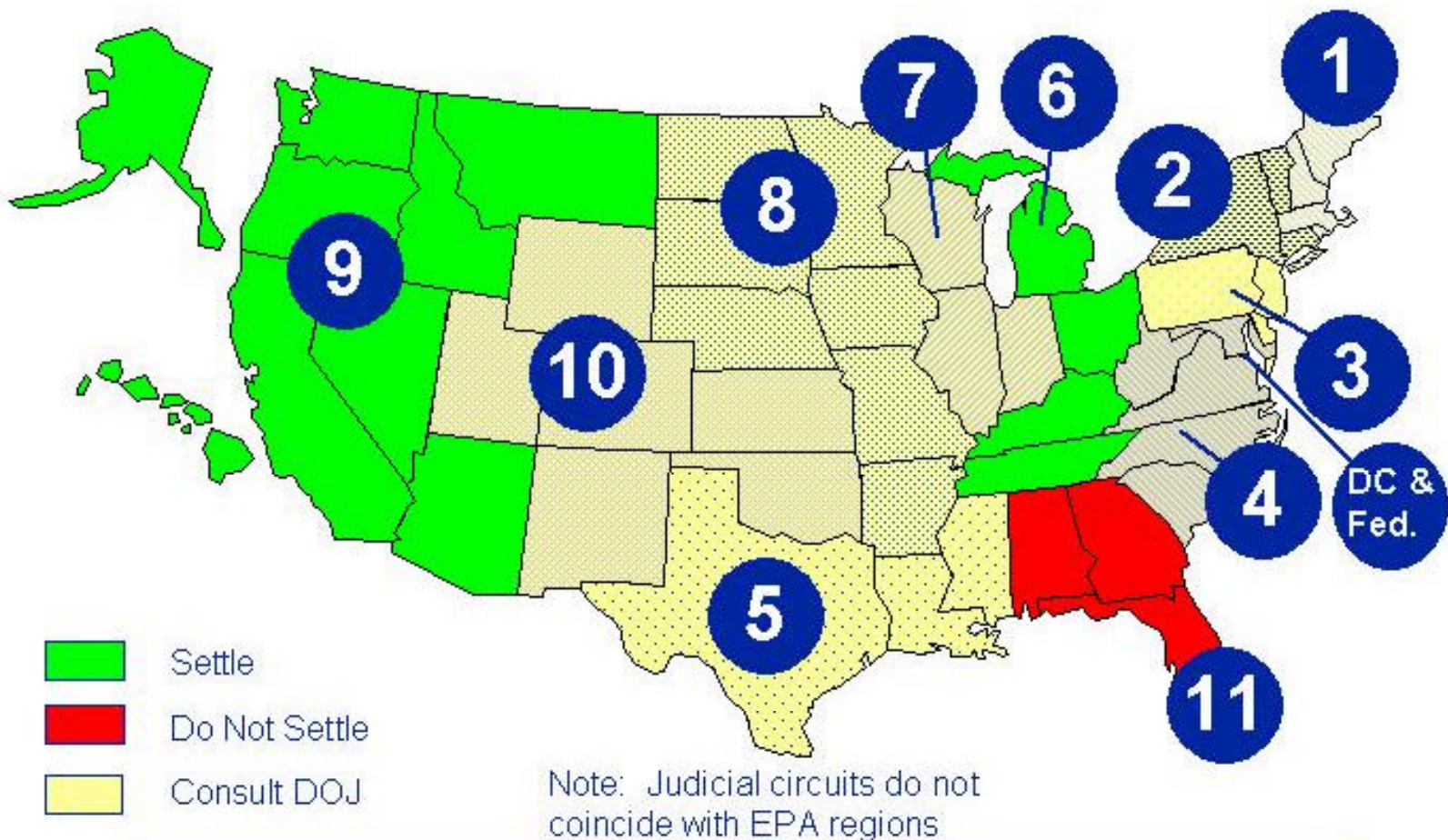
- FINAL JUDGEMENT & APPEAL TO 11th Circuit.
- Other options in the interim:
  - Memo for the Deputy Assistant Secretary of the Navy (Environment) of 20 May 2002.



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# Penalty Policy by Judicial Circuit

## Treatment of CAA State Penalties





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# QUESTIONS??????

- HOW TO CONTACT US:
  - Commander, Navy Region Southeast, P.O. Box 102, Jacksonville, FL32212-0102.
  - David Pipkin: (904) 542-3166, DSN 942-3166  
pipkind@cnrse.navy.mil
  - LCDR Sue Stewart (904) 542-4585, DSN 942-4585, stewart@cnrse.navy.mil